Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

UNISYS CORPORATION,

Petitioner,

v.

CESKA SPORITELNA, A.S.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a party to a contract, which has agreed to arbitrate all disputes arising out of the contract, may avoid arbitration by suing a non-signatory corporate affiliate of the contract party, rather than the corporate entity it contracted with?

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I. THIS COURT'S DECISION IN *FIRST OPTIONS V. KAPLAN* DID NOT ADDRESS THE APPLICABILITY OF ARBITRATION TO NON-SIGNATORIES

Respondent Ceska Sporitelna's ("CS") primary argument in response to Unisys Corporation's ("Unisys") petition seeking review of the lower courts' refusal to enforce an arbitration agreement with respect to a non-signatory corporate affiliate is that the issue of whether arbitration agreements should be extended to non-signatories has already been decided by the Court in *First Options v. Kaplan,* 514 U.S. 938 (1995). This interpretation of *First Options* defies a plain reading of the limited holding of that case, and underscores the need for the Court's review in this case.

In the Court of Appeals the *First Options* case did involve a dispute over whether an arbitration agreement should be extended to a non-signatory, although not in the parent-subsidiary context that the lower courts treated as dispositive here. *Kaplan v. First Options,* 19 F.3d 1503 (3d Cir. 1994). This Court, however, limited its review to two narrow procedural issues:

> (1) how a district court should review an arbitrator's decision that the parties agreed to arbitrate a dispute; and (2) how a court of appeals should review a district court's decision confirming, or refusing to vacate, an arbitration award.

First Options, 514 U.S. at 940. The Court expressly declined to review the lower court's substantive ruling. *Id.* at 949. CS's reliance on *First Options* is therefore incorrect. The issue raised in Unisys' petition is one of first impression for this Court.

II. THE THIRD CIRCUIT'S REFUSAL TO APPLY ARBITRATION CLAUSES TO NON-SIGNATORY CORPORATE PARENTS IS IN CONFLICT WITH THE PRACTICAL RULE DEVELOPED IN OTHER CIRCUITS

CS seeks to avoid the conflict between the Third Circuit's treatment of arbitrability of claims involving non-signatories, and the prevailing federal precedents extending arbitration clauses to non-signatories, by arguing that the decisions in other Circuits pre-date this Court's decision in *First Options,* which did not address the non-signatory issue, and by exaggerating minor factual distinctions among cases that do not explain the patent differences in doctrine. Response at 8. The "relatedness" or "involvement" theory, pursuant to which arbitration clauses are extended to non-signatory corporate affiliates whose conduct is related to or involved with the underlying contract, is the prevailing rule in most courts that have addressed the issue. *See Thomson-CSF, S.A. v. American Arbitration Association,* 64 F.3d 773, 779 (2d Cir. 1995) ("[T]he circuits have been willing to estop a signatory from avoiding arbitration with a non-signatory when the issues the non-signatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed."); *Sunkist Soft Drinks v. Sunkist Growers,* 10 F.3d 753, 758 (11th Cir. 1993) ("The nexus between Sunkist's claims and the license agreement . . . leads us to the conclusion that the claims are 'intimately founded in and intertwined with' the license agreement [containing the arbitration clause]."), *cert. denied,* 513 U.S. 869 (1994); *Britton v. Co-Op Banking Group,* 4 F.3d 742, 747 (9th Cir. 1993)(the key issue was whether the non-signatory's alleged wrongdoing "relate[s] to or arise[s] out of the contract containing the arbitration clause"); *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.,* 863 F.2d 315, 320-21 (4th Cir. 1988)("When the charges against a parent company and its subsidiary are based on the same facts and are inherently inseparable, a court may refer claims against the parent to arbitration even though the parent is not formally a party to the arbitration agreement."); *Goodwin v. Ford Motor Credit Co.,* 970 F. Supp. 1007, 1016-17 (M.D. Ala. 1997) ("What is

necessary is that the claim against the non-signatory be inextricably bound up with the terms and duties of the contract the plaintiff has signed with the other defendant."); *Gulf Guaranty Life Ins. Co. v. Connecticut General Life Ins. Co.*, 957 F. Supp. 839, 841-42 (S.D. Miss. 1997) ("The Court finds that the doctrine of equitable estoppel should apply in cases in which a non-signatory seeks to enforce an arbitration agreement against a signatory to that agreement where the non-signatory is an agent of a signatory or where the claims against the non-signatory are 'intimately founded in and intertwined with' the agreement containing the arbitration clause.")(citation omitted); *Usina Costa Pinto, S.A. Acucar E Alcool v. Louis Dreyfus Sugar Co.*, 933 F. Supp. 1170, 1179 (S.D.N.Y. 1996) ("[B]ecause of . . . the integral link between the fraud claim and the underlying contractual obligations, [the] nonsignatory may invoke the arbitration clause."); *cf. Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509, 514 n.5 (9th Cir. 1988) ("[T]he alleged conduct of the non-parties is so closely related to the contractual relationship that the forum selection clause applies to all defendants."); *Texas Source Group v. CCH, Inc.*, 967 F. Supp. 234, 237 (S.D. Tex. 1997)("[Non-signatory's] relationship with the plaintiffs and the defendants is so inextricably intertwined that he should be subject to the forum-selection clause.") The failure of the District Court and Court of Appeals to follow this uniform doctrine has created a conflict in the Circuits on a matter of importance to the Federal Arbitration Act and to international commerce.

The fact that some of the courts invoking this practical rule found on the facts before them that the claims and contracts were not sufficiently intertwined to warrant applying the arbitration clause to the non-signatory, *see, e.g., Thomson-CSF, S.A., supra,* and *Britton, supra,* or that other cases that were directed to arbitration involved different facts than the instant case, Response at 9, does not obscure the serious conflict between the practical non-signatory doctrine applied in most circuits, and the formalistic rule requiring precise identity of contracting parties applied by the lower courts in this case. *Ceska Sporitelna, a.s. v. Unisys Corp.*, C.A. No. 96-4152, 1996 U.S. Dist. LEXIS 15435, * 17 (E.D. Pa. Oct. 10,

1996)("[T]he decision did not turn on the amount of involvement [the non-signatories] had with the License Agreement containing the arbitration clause but solely on the corporate relationship between [non-signatories and signatories]."), *aff'd without opinion,* 116 F.3d 467 (3d Cir. 1997). If this Court resolves the split in the circuits by endorsing the practical non-signatory doctrine applied by other courts in the federal system and advocated by Unisys here, it will create a uniform standard under the FAA that provides some certainty and predictability to international commercial contracts.

An example of the appropriate contours of such a non-signatory doctrine can be found in *Collins v. International Dairy Queen,* 169 F.R.D. 690, 693 (M.D. Ga. 1997) cited, selectively, at page ten of CS's Response. CS refers to a portion of that opinion in which the court denies the benefit of an arbitration agreement in certain subfranchisee agreements to non-signatory parties having a tangential corporate relationship to the franchise arrangements, but no other relationship with the sale or performance under those agreements. *Id.* at 693. CS omits, however, the discussion in the preceding paragraph wherein the court, relying on *J.J. Ryan* and *Sunkist,* extends the arbitration clause to a *non-signatory parent* of a contract signatory because of the close relationship between the conduct alleged against the parent and the agreements containing the arbitration clauses. *Collins,* 169 F.R.D. at 692-93. This is the precise circumstance presented here.

Collins incorporates in one decision the complete doctrinal framework urged by Unisys. Arbitration clauses should not be extended to non-signatories *solely* on the basis of some corporate or business relationship, but should be extended to affiliated non-signatories which have been accused of conduct inextricably intertwined with the contract containing the arbitration clause.

III. THE RULE ADVOCATED BY PETITIONER IS NECESSARY TO SECURE CONTRACTUAL COMMITMENTS TO ARBITRATION

CS relies on the uncontroversial proposition that arbitration agreements are creatures of contract as an absolute defense to Unisys' invocation of the arbitration clause. But the narrow, formalistic view of contractual obligations advanced by CS would, if accepted, completely vitiate all applications of the non-signatory rule, which exists in some form in every Circuit that has addressed the issue.

The non-signatory rule does not defeat contractual commitments, but rather secures them against tactical pleading. CS protests a nonmutuality to the non-signatory rule asserted by Unisys, but, in fact, under the lower courts' opinions it is CS that is free to manipulate its business relationship with Unisys to achieve the forum it desires. CS knew from the inception of the project that various entities in the Unisys structure would support the Unisys subsidiary that signed the contract with CS; indeed, the contract was marketed and negotiated by Unisys European subsidiaries other than the one with which CS contracted. According to CS's argument, all Unisys entities that participated in and supported the project were vulnerable to lawsuits from the inception of the business relationship, despite CS's commitment to arbitrate disputes arising out of the project.[1] CS, not Unisys, had the manipulable agreement to arbitrate: if it chose arbitration, it could sue the Unisys subsidiary with which it contracted; if it chose litigation, it could sue any of the other Unisys entities

1. CS alleges that "most of the misrepresentations by Unisys . . . were made in writing in documents that clearly identified Unisys Corporation as the speaker." Response at 5. By this statement, CS suggests that the transmittal of documents containing the Unisys logo by the Unisys subsidiaries with which CS did contract constituted a waiver of the arbitration agreement intended as the dispute resolution mechanism for the project, rather than simply a symbol of the fact that Unisys's subsidiary was providing CS with products and services developed by multiple components of Unisys' multinational enterprise. By its assertions, CS implies that the commitment to arbitration was a dead letter from the outset of the contract, defying common sense contract interpretation and business principles.

that participated in the transaction, without any meaningful distinction between the facts alleged in either action. Courts applying the non-signatory doctrine have invoked the practical doctrine of estoppel to deter such tactical pleading. *Sunkist,* 10 F.3d at 758 ("Sunkist is equitably estopped from avoiding arbitration of its claims [since] each claim presumes the existence of [the] agreement [containing the arbitration clause]."); *Hughes Masonry Co. v. Greater Clark Cty. Sch. Bldg. Corp.,* 659 F.2d 836, 841 (7th Cir. 1981)(since plaintiff "must rely on the terms of the . . . agreement in its claims [it] is estopped from repudiating the arbitration clause of this agreement").

In order to distinguish its claim against Unisys from the contract based claims it should have asserted in arbitration against the Unisys subsidiary with which it contracted, CS misrepresents the Complaint it filed in this action. CS asserts "independent fraudulent acts" other than, as Unisys characterized the complaint, "misrepresentations regarding its subsidiary's ability to deliver the computer system." But the "independent acts" described are all alleged misrepresentations inducing CS to enter into and remain in the relevant contracts, Response at 4, exactly as Unisys described, and as the Complaint explicitly states. *See* Complaint ¶ 2 ("The Defendant's misrepresentations and concealments, as specifically described in this Complaint, first persuaded the Plaintiff to select . . . [a] Unisys computer system . . . and then induced the Plaintiff to continue to pay large sums of money to Unisys subsidiaries, and not to terminate its relationship with Unisys."); Complaint ¶ 23 ("[I]n reliance on the aforesaid representations of Defendant Unisys, CS agreed, in June of 1992, to pay an estimated U.S. $90,000,000 to a second Unisys subsidiary, Unisys International Services, BV, to implement the delivery to CS of the Unisys System."); Complaint ¶ 32 ("[O]n March 31, 1994, in reliance on the aforesaid representations of Unisys, CS again agreed to pay a Unisys subsidiary to complete the installation of the Unisys System."). All these

allegations "presume the existence of [the] agreement [containing the arbitration clause]," and, therefore, are properly directed to arbitration.[2] *Sunkist,* 10 F.3d at 758.

2. CS further misrepresents its commitment to arbitrate by asserting that only three of the five contracts to procure a computer banking system contain an agreement to arbitrate. Those three contracts are the *only* contracts to procure a banking system; the other two documents, pleaded in lieu of the actual contracts in CS's complaint, were interim agreements, intended to serve solely as the framework for the official contracts, all containing arbitration clauses, which defined the relationships between the parties.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Unisys' principal brief, the petition for writ of certiorari should be granted.

Respectfully submitted,

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